Supreme Court, U.S.
FILED
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(14)

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

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1992

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BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF RESPONDENT

The American Academy of Actuaries submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of respondent in No. 91-904, having obtained the written consent of both the petitioner and the respondent to do so. Said written consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for actuaries of all specialties practicing within the United States, and to seek greater public recognition for the actuarial profession. To become an Academy member, an actuary must satisfy rigorous education and experience requirements. Membership in the Academy is a requirement in many states to perform certain types of actuarial work. The Academy's primary activities include liaison with federal and state governments, relations with other professions, dissemination of public information about the actuarial profession, and the promulgation and implementation of standards of professional conduct, practice and qualification. The Academy's membership exceeds 10,000 actuaries nationwide.

The Academy maintains an Actuarial Standards Board (the "ASB"), an independent, quasi-legislative body, to develop and adopt Standards of Practice for the actuarial profession. Actuaries who are members of the Academy and other professional associations are required to comply with the ASB's practice standards, which are detailed and serve as a guide for sound actuarial practice. The Academy has also adopted a Code of Professional Conduct to govern the professional ethics of its members.[1]

The Standards of Practice and the Code of Professional Conduct are administered by another independent body, the Actuarial Board for Counseling and Discipline (the

[1] Prior to the adoption of the Code, the Academy maintained Guides to Professional Conduct to govern the ethical conduct of its members; the Guides were supplemented by Interpretative Opinions. Interpretative Opinions 3 and 4 were recently republished by the ASB, and are incorporated by reference in several of the ASB's Standards of Practice. Copies of relevant Standards of Practice, the Code of Professional Conduct, and Interpretative Opinions 3 and 4 are appended hereto, and have been lodged with the Court with the consent of the petitioner and respondent.

"ABCD"). The ABCD's purpose is to maintain a high quality of actuarial practice by investigating complaints against actuaries, and counseling actuaries concerning the application of standards of practice, conduct and qualification to their professional activities. The Academy and four other United States actuarial organizations have delegated to the ABCD responsibility to investigate complaints against their members, and to counsel their members in sound actuarial practice and conduct. The ABCD is also authorized to recommend to those organizations that public discipline in the form of reprimand, suspension or expulsion from membership be taken against actuaries where serious violations have occurred.

The Academy has numerous members who provide actuarial services to multiemployer pension plans. These members furnish the plans with expert valuations from which, among other things, the withdrawal liability of employers may be determined. The Academy anticipates that the Court's decision in this case may have a significant effect upon the professional practice of these actuaries. Moreover, as an organization representing actuaries, the Academy is uniquely positioned to advise the Court of the actuarial profession's efforts to insure that its members observe high standards of practice and conduct, standards which petitioner's arguments seem to undervalue. Indeed, the allegations made by petitioner Concrete Pipe and Products of California, Inc. ("CPP") impugn both the integrity of the actuarial profession and the level of expertise required to render actuarial advice, suggesting that the expert opinions of actuaries serving multiemployer pension plans should not be accorded significant evidentiary weight. The Academy disagrees with CPP's allegations and, accordingly, has a substantial interest in the outcome of this proceeding.[2]

[2] The Academy takes no position as to the second issue raised in proceeding, namely, whether the provisions of the Multi-Employer Pension Plan Amendments Act were unconstitutional as applied to CPP in this particular case.

SUMMARY OF ARGUMENT

The evidentiary assumptions created by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, are fully consistent with Congress' purpose in adopting the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.* Contrary to CPP's assertions, the presumptions do not deprive withdrawing employers of an impartial decision-maker, because the actuaries whose valuations serve as the basis for withdrawal assessments are required by the standards of their profession to render their valuation opinions in an unbiased, ethical manner. Further, in the rare case where an actuary departs from the standards of practice and conduct required by the profession, the review procedures established by MPPAA provide an appropriate means to insure that employers will not be required to pay unreasonable withdrawal assessments.

Actuaries have been recognized by the courts as expert professionals who are well-equipped to make the complex calculations necessary to achieve reasonable withdrawal assessments. Congress' decision to accord special weight to actuaries' expert views is within its authority to establish evidentiary rules, and is a reasonable means to achieve its objectives under ERISA. The Academy therefore requests that the decision of the court below upholding the constitutionality of the evidentiary presumptions established by MPPAA be affirmed.

ARGUMENT

ERISA was enacted, among other things, to prevent employees from suffering the devastating loss of their pension benefits through unanticipated plan termination. *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 374 (1980). However, ERISA's original termination liability provisions created an incentive for employers to withdraw from a multi-employer pension plan at the first sign of financial trouble, rather than be saddled with heavy liability to the Pension Benefit Guaranty Corporation if the plan ultimately failed. *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 216 (1986), *citing* Pension Plan Termination Insurance Issues: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means House of Representatives, 95th Cong., 2nd Sess. 22 (1978) (statement of Matthew M. Lind). Congress enacted MPPAA "as part of an overall statutory scheme to safeguard the solvency of [multiemployer] pension plans." *Connolly, supra* at 228.

MPPAA requires employers, upon withdrawing from plans, to pay "a *fixed and certain debt* to the pension plan." *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 725 (1984), *quoting* 29 U.S.C. §§ 1381, 1391 (emphasis added). The employer's withdrawal liability is determined by the plan trustees, based upon calculations made by the plan's actuary. If the employer challenges the assessment in arbitration, the calculations are presumed by the arbitrator to be correct unless the employer "shows by a preponderance of the evidence that the determination was unreasonable in the aggregate or clearly erroneous." 29 U.S.C. § 1401(a)(3) (1982). The arbitrator's findings of fact are subject to a similar rebuttable presumption of validity if either party brings suit to enforce, vacate or modify the arbitrator's award. 29 U.S.C. § 1401(b)(2) (1982).

I. THE ACTUARIAL PROFESSION REQUIRES ITS MEMBERS TO PERFORM WORK IN A COMPETENT, UNBIASED AND ETHICAL MANNER

CPP's claim that it was denied access to an impartial decision-maker rests entirely upon its assertion that the presumptions established by MPPAA cannot effectively be rebutted. *See generally Brief on the Merits by Petitioner* (July 10, 1992) at 43-49. However, CPP is mistaken in its assertion that "there is no objective yardstick" to measure the fairness of the actuary's assumptions. *Petition for Certiorari* (December 3, 1991) at 13. MPPAA requires actuarial calculations to be reasonable in the aggregate, "taking into account the experience of the plan and reasonable expectations." The calculations must also "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a). This provision requires actuaries to exercise their expert judgment in the selection of actuarial *assumptions*. It does not allow them to make unreasonable calculations, or to ignore a plan's history or likely future experience.

The ASB has adopted two Standards of Practice that offer specific guidance to pension actuaries. Actuarial Standard of Practice No. 4, "Recommendations for Measuring Pension Obligations," contains detailed instructions for measuring and communicating pension obligations. *See generally App.* A-1 - A-21.[3] Actuarial Standard of Practice No. 12, "Concerning Risk Classification," sets forth specific "guidelines for actuaries in designing, using and updating risk classification systems," to insure fairness and "soundness of the financial security system." *See App.* A-24 - A-25, §§ 1.1., 5. The ASB has also adopted Actuarial Standard of Practice No. 17, "Expert Testimony by Actuaries," which applies to testimony concerning "[w]ithdrawal liability assessments under multiemployer plans." *See App.* A-35, § 4.1(J). That Standard specifically states that a conflict of interest exists "whenever the actuary's objectivity, or duty owed to a client or employer, is impaired by competing interests," and requires the actuary to disclose the conflict "to all interested parties." *See App.* A-36, § 5.2. The Standard further provides that "[t]he actuary's fundamental obligation when giving expert testimony is to provide the forum with a *valid actuarial opinion*." *See App.* A-36, § 5.5 (emphasis added).

[3] The ASB is also developing a Standard to provide actuaries with detailed guidance on the selection of economic assumptions for measuring pension plan obligations.

Departure from these standards could bring an actuary before the ABCD, and could lead to counseling or, if the actuary's failure to comply with the standards was sufficiently severe, to public reprimand, suspension or expulsion from membership. Failure to comply with the standards might also constitute substantial evidence in arbitration or litigation that the plan actuary assumptions were not, in the aggregate, reasonable. *Cf.* 29 U.S.C. § 1393(a).

Similarly, the Code of Professional Conduct requires actuaries to "perform professional services with integrity, skill and care," and to refuse to provide services if the actuary "believes they may be used to violate or evade the law." *See App.* A-38, A-39, Precepts 2, 9. An actuary who deliberately distorted a withdrawal liability calculation in order to inflate the employer's liability arguably should anticipate that the calculation would be used to evade the "reasonableness" requirements of MPPAA, in violation of Precept 9 of the Code. Such a biased calculation would not be rendered with the integrity that Precept 2 of the Code requires. Again, an actuary who failed to satisfy these requirements would be subject to counseling, public reprimand, suspension or expulsion from the actuary's professional organizations.

The Interpretative Opinions that were recently republished by the ASB, and that are incorporated by reference into several of the Standards of Practice, also require actuaries to exercise their professional judgment in an in-

dependent and ethical manner. Interpretative Opinion 4 requires all actuarial assumptions and methods to be "selected and applied with integrity, informed judgment and perspective in relation to the circumstances applicable to the particular situation and the purpose for which the results are intended." *See App.* A-44. Further, in an instance where a client or employer requests a service that conflicts with an actuary's professional judgment, Interpretative Opinion 3 requires the actuary to "advise the client or employer of the conflict and . . . include appropriate qualifications and disclosures in any related actuarial communications." *See App.* A-43. An employer, seeing these disclosures and qualifications, could use them in arbitration to challenge the reasonableness of the withdrawal assessment.

Thus, actuaries practicing under MPPAA are required by the standards and tenets of their profession to perform their work in a comptent, unbiased and ethical manner. An actuary is also required to disclose any departure from the actuary's expert judgment, or conflict of interest, in a manner that would give an employer opportunity to challenge the reasonableness of the withdrawal liability calculations.[4]

For this reason, CPP's general reliance upon *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787

[4] A plan might employ an actuary whose education or experience were insufficient to meet the membership requirements of the Academy or other actuarial membership organizations that have adopted the Standards and Code. Such an actuary would be beyond the jurisdiction of the ABCD. However, that actuary's credentials would, presumably, be considered as a factor when weighing the actuary's testimony, just as the respective credentials of CPP's actuary and the plan actuary were considered by the arbitrator and district court in this case. *See Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe and Products*, Civ. Action Nos. 82-5184 HLH and 88-5759 HLH (C.D. Cal. July 3, 1989), *Joint Appendix*, Vol. II at 423.

F.2d 128 (3rd Cir. 1986), *aff'd without opinion by a divided Court*, 481 U.S. 735 (1987), is misplaced. In *Yahn*, the court asserted that withdrawing employers are deprived of an unbiased decision maker because the plan trustees are fiduciaries of the plan and, therefore, inherently biased in favor of the plan and its beneficiaries. 787 F.2d at 139-41. The *Yahn* court's assertions of trustee bias are no more than "generalized assumptions of possible interest" based solely upon the institutional role assigned to the trustee by MPPA. As this Court has noted, "[s]uch assertions require substantiation before they can provide a foundation for invalidating an Act of Congress." *Schweiker v. McClure*, 456 U.S. 188, 196 n. 10 (1982).

Moreover, the statutory obligations of the trustees will not necessarily result in unfairness to employers. As the First Circuit Court of Appeals has recognized:

> [Plan trustees'] knowledge that they must act uniformly over time, treating like cases alike, significantly cabins their discretion, for it tends to create a uniform employer interest in favor of fair rules and, given the need to maintain employer membership and satisfaction, it entails a trustee obligation of fair treatment to withdrawing employers as part of their obligation to the fund.

Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund, Inc., 762 F.2d 1137, 1141 (1st Cir. 1987).

Even if plan trustees may be assumed to be unfairly biased as stated in *Yahn*, however, actuaries working for plans are prohibited by the tenets of their profession from indulging in such bias. Further, in the rare instance where an actuary fails to exercise impartial professional judgment in making MPPAA calculations, the review process established by MPPAA should suffice to reveal the actuary's bias. For example, in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3rd Cir. 1990), the Third

Circuit Court of Appeals reiterated its assumption that MPPAA trustees are inherently biased and extended that assumption to plan actuaries, arguing that, because the plan pays the actuary, the trustees may exert undue influence over the actuary. 916 F.2d at 93, *citing United States v. Will*, 449 U.S. 200, 217-19 (1980). However, both the arbitrator and the court in *Huber* were able to determine from minutes of a Board of Trustees meeting that the assumptions and methods used in the actuary's valuation were not the product of impartial professional expertise, but appeared to have been influenced by pressure from the plan trustees to inflate employer withdrawal liability. 916 F.2d at 90, 93. *Huber* demonstrates that the MPPAA review procedures should be sufficient to protect employers in the exceptional case where an actuary yields to undue influence.

II. ACTUARIES HAVE SPECIAL EXPERTISE, AND ARE WELL QUALIFIED TO RENDER MPPAA VALUATIONS

As this Court previously observed when deliberating the constitutionality of MPPAA, Congress was not required, when drafting the statute, to select the best possible method for achieving its objectives, but merely to enact legislation that was rationally related to Congress' legislative purposes. *R.A. Gray & Co., supra*, 467 U.S. at 729-30, *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (additional citations omitted). MPPAA's evidentiary presumptions represent Congress' recognition that actuaries possess special expertise, and are uniquely qualified to render the calculations upon which reasonable withdrawal assessments may be based.

Congress included in MPPAA the rebuttable presumptions that are at issue here "to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Session, 1, 86, 1980 U.S. Code Cong. & Admin. News 2918, 2954. Without the presumptions, withdrawing employers might be expected to challenge every withdrawal liability assessment, and not merely those that are unreasonable or erroneous. These constant challenges would waste plan assets by forcing trustees to defend complex actuarial calculations, and would create ongoing doubt that the "fixed and certain debt" assessed by MPPAA would be paid by withdrawing employers, thereby complicating the actuary's efforts to project the plan's future assets. *Cf. Gray, supra*, 476 U.S. at 725, *quoting* 29 U.S.C. §§ 1381, 1391.

As the courts have recognized, "[a] fund's actuarial soundness at any specific time depends on a complex interaction of many factors including anticipated life spans of beneficiaries, estimated appreciation or depreciation of fund assets, and the likelihood that the contribution base will remain stable." *Board of Trustees of the Western Conference of Teamster Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1402 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), *citing Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247, 1267 (7th Cir. 1983), *cert. denied*, 469 U.S. 1259 (1984). Given that legitimate differences of opinion may exist as to actuarial assumptions and methods, Congress "created the statutory presumption in favor of withdrawal determinations expressly to forestall endless disputes 'over technical actuarial matters with respect to which there are often several equally "correct approaches."'" *Combs v. Classic Coal Corporation*, 931 F.2d 96, 99-100 (D.C. Cir. 1991), *quoting* S. 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 98th Cong., 2nd Sess. 21 (1980). We know of no class of pension professionals that is better qualified than actuaries to assess the complex, interrelated factors that determine a plan's actuarial soundness, and to make the valuations from which

withdrawal assessments are calculated. MPPAA's withdrawal liabiilty procedures insure that "[c]omplex technical determinations of the amount of liability are allocated to those with the greatest expertise. Plans are protected under [MPPAA] from inconsistent judicial or arbitrator holdings by a range of acceptable actuarial methods." *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund Benefit Plan A*, 578 F.Supp. 1222, 1238 (D.D.C. 1984), *aff'd without opinion*, 753 F.2d 166 (D.C. Cir. 1985); *see also Combs, supra*, 931 F.2d at 100. MPPAA does not require an actuary "to choose the figure that the court would choose as the most reasonable . . . . Rather, the only requirement is that in every case the actuarial determination will fall within the range of reasonableness." *Board of Trustees, Michigan United Foods and Commercial Workers Unions v. Eberhart Foods, Inc.*, 831 F.2d 1258, 1261 (6th Cir. 1987). This approach permits a plan actuary to exercise professional judgment in selection of actuarial assumptions and methods, while protecting the employer from being forced to pay an unreasonable withdrawal assessment. Congress' decision to structure MPPAA in this fashion was rationally related to Congress' legislative objectives, and should be upheld.

III. MPPAA'S EVIDENTIARY PRESUMPTIONS ARE REBUTTABLE

CPP's inability to marshall an adequate rebuttal in this case does not establish that MPPAA's evidentiary presumptions may never be rebutted. To the contrary, case law applying the presumptions demonstrates that actuarial calculations are subjected to careful scrutiny in arbitration and litigation, and are rebutted where circumstances warrant. *See, e.g., Huber, supra; see also Sigmond Cohn Corp. and Machinists District No. 15 Pension Fund*, 14 E.B.C. (BNA) 1031 (1991) (Sands, Arb.); *Carnation Co., Inc. and Central States Pension Fund*, 9 E.B.C. (BNA) 1409 (1988) (Nagle, Arb.); *Casablanca Industries, Inc. and U.F.C.W. Local 23-Giant*

Eagle Pension Fund, 7 E.B.C. (BNA) 2705 (1986) (Jaffe, Arb.); *Classic Coal Corp. v. U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 1449 (1984) (Nagle, Arb.); *Palmer Coking Coal Co. and U.M.W. 1950 and 1974 Pension Plans*, 5 E.B.C. (BNA) 2369 (1984) (Gordon, Arb.); *Perkins Trucking Co. and Local 807 Pension Fund*, 4 E.B.C. (BNA) 1489 (1983) (O'Loughlin, Arb.).

As this Court has observed, "when Congress creates a statautory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (opinion of Brennan, J.). The Court has also held that, "when it comes to evidentiary rules in matters 'not within specialized judicial competence or completely commonplace,' it is primarily for Congress "to amass the stuff of actual experience and cull conclusions from it.'" *Turner Elkhorn, supra*, 428 U.S. at 33-34, *quoting United States v. Gainey*, 380 U.S. 63, 67 (1965).

Here, Congress has determined that the public interest in ensuring stability in multi-employer pension plans is best served by according evidentiary weight to the expert calculations of plan actuaries through a rebuttable presumption of reasonableness. Contrary to CPP's assertions, the presumption has been and can be rebutted effectively where the circumstances warrant. The Academy therefore urges the Court to affirm the constitutionality of the MPPAA evidentiary presumptions.

CONCLUSION

For the foregoing reasons, the Academy respectfully requests that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

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September 11, 1992